Supreme Court, U.S.
FILED
MAR 6 - 2015
OFFICE OF THE CLERK

Nos. 14-556, 14-562, 14-571 & 14-574

IN THE

Supreme Court of the United States

APRIL DEBOER, ET AL.,
Petitioners,

v.

RICHARD SNYDER, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR FREEDOM TO MARRY AS AMICUS CURIAE SUPPORTING PETITIONERS

JONATHAN P. SCHNELLER
DIMITRI PORTNOI
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, Cal. 90071

ANTON METLITSKY
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, N.Y. 10036

WALTER DELLINGER
(*Counsel of Record*)
wdellinger@omm.com
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Amicus Curiae

VALERIA TANCO, ET AL.,
Petitioners,

v.

WILLIAM EDWARD "BILL" HASLAM, ET AL.,
Respondents.

GREGORY BOURKE, ET AL.,
Petitioners,

v.

STEVE BESHEAR, ET AL.,
Respondents.

JAMES OBERGEFELL, ET AL.,
Petitioners,

v.

RICHARD HODGES, ET AL.,
Respondents.

TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 5

I. IF FORMAL HEIGHTENED SCRUTINY DOES NOT APPLY, RESPONDENTS' MARRIAGE BANS SHOULD BE SUBJECT TO A SEARCHING RATIONAL BASIS REVIEW 5

A. The Rational Basis Test Requires Careful Scrutiny Of Laws That Deprive Disfavored Social Groups Of Dignity And Liberty 5

B. The Challenged Marriage Bans Require Meaningful Scrutiny Even Under Rational Basis Review 14

II. RESTRICTIONS ON THE FREEDOM TO MARRY BASED ON SEX AND SEXUAL ORIENTATION CANNOT SURVIVE MEANINGFUL REVIEW 19

A. The Rationales For Marriage Bans Based On Sex And Sexual Orientation Proffered By The Sixth Circuit Do Not Withstand Searching Rational Basis Review 20

B. The Absence Of A Valid Rationale For The Marriage Bans Establishes That The Withholding Of The Freedom To Marry And Respect For Marriages Are Motivated By Impermissible Animus 28

TABLE OF CONTENTS
(continued)

Page

C. There Is No Ground for Distinction Between Respondents' Refusal To Respect Out-Of-State Marriages And Withholding The Freedom To Marry Itself.....32

CONCLUSION.....34

TABLE OF AUTHORITIES

Page(s)

CASES

Adarand Constr. Inc. v. Peña,
515 U.S. 200 (1995) 2

Allied Stores of Ohio, Inc. v. Bowers,
358 U.S. 522 (1959) 6

Baehr v. Lewin,
852 P.2d 44 (Haw. 1993) 29

Baskin v. Bogan,
766 F.3d 648 (7th Cir.), *cert. denied*,
135 S. Ct. 316 (2014) 3, 22, 25

Bd. of Trs. of the Univ. of Ala. v. Garrett,
531 U.S. 356 (2001) 16, 29

Boddie v. Connecticut,
401 U.S. 371 (1981) 33

Bowen v. Gilliard,
483 U.S. 587 (1987) 7, 8

City of Cleburne v. Cleburne Living Ctr., Inc.,
473 U.S. 432 (1984) .....passim

DeBoer v. Snyder,
772 F.3d 388 (6th Cir. 2014) 21, 22, 26, 32

Dep't of Agric. v. Moreno,
413 U.S. 528 (1973) .....passim

Eisenstadt v. Baird,
405 U.S. 438 (1972) 12, 13, 18, 24

FCC v. Beach Commc'ns, Inc.,
508 U.S. 307 (1993) 6, 11

TABLE OF AUTHORITIES
(continued)

Page(s)

Ferguson v. Skrupa,
372 U.S. 726 (1963) 6

Frontiero v. Richardson,
411 U.S. 677, 686 (1973) 7, 15

Goodridge v. Dep't of Pub. Health,
798 N.E.2d 941 (Mass. 2003) 30

Griswold v. Connecticut,
381 U.S. 479 (1965) 25

Hayes v. Missouri,
120 U.S. 68 (1887) 7

Heller v. Doe,
509 U.S. 312 (1993) 23

Johnson v. Robison,
415 U.S. 361 (1970) 2, 3, 7

Kelo v. City of New London,
545 U.S. 469 (2005) 20

Kitchen v. Herbert,
961 F. Supp. 2d 1181 (D. Utah 2013),
aff'd, 755 F.3d 1193 (10th Cir. 2014) 26, 34

Lawrence v. Texas,
539 U.S. 558 (2003) .....passim

Loving v. Virginia,
388 U.S. 1 (1967) 17, 32

M.L.B. v. S.L.J.,
519 U.S. 102 (1996) 13, 17, 18

Meyer v. Nebraska,
262 U.S. 390 (1923) 17, 32

TABLE OF AUTHORITIES
(continued)

Page(s)

New Orleans v. Dukes,
427 U.S. 297 (1976) 11

Obergefell v. Wymsylo,
962 F. Supp. 2d 968 (S.D. Ohio 2013)..... 30, 31

Palmore v. Sidoti,
466 U.S. 429 (1984) 27

Perry v. Schwarzenegger,
704 F. Supp. 2d 921 (2010)..... 16

Pers. Adm'r of Mass. v. Feeney,
442 U.S. 256 (1979) 29

Plyler v. Doe,
457 U.S. 202 (1982) 8, 28, 34

Reed v. Reed,
404 U.S. 71 (1970) 2

Romer v. Evans,
517 U.S. 620 (1996) .....passim

Turner v. Safley,
482 U.S. 78 (1987) 24, 25

United States v. Virginia,
518 U.S. 515 (1996) 27

United States v. Windsor,
133 S. Ct. 2675 (2013) .....passim

Vance v. Bradley,
440 U.S. 93 (1979) 3

Williamson v. Lee Optical,
348 U.S. 483 (1955) 11

TABLE OF AUTHORITIES
(continued)

Page(s)

Zablocki v. Redhail,
434 U.S. 374 (1978) 17, 25, 33

CONSTITUTIONAL PROVISIONS

Ky. Const. § 233A (2004) 30

Mich. Const. art. I, § 25 (2004) 30

Ohio Const. art. XV, § 11 (2004) 30

Tenn. Const. art. XI, § 18 (2006) 30

STATUTES

Ky. Rev. Stat. § 402.005 (1998) 30

Mich. Comp. Laws § 551.1 (1996) 30

Tenn. Code Ann. § 36-3-113(a) (1996) 30

OTHER AUTHORITIES

American Enterprise Institute, Attitudes About Homosexuality & Gay Marriage (2008) 30

Chauncey, *Gay New York* (1994) 15

Chauncey, *Why Marriage?* (2004) 30

CNN, *Poll: Majority Backs Same-Sex Marriage* (June 26th, 2013) 34

Kelley, *A Marriage of Politics and Religion*, The Nashville Scene, Oct. 19, 2006 31

Leibovich, *From Star Power to Blood Sport, Tennessee Senate Race Has It*, N.Y. TIMES (Nov. 5, 2006) 31

TABLE OF AUTHORITIES
(continued)

Page(s)

Letter from John W. Macy to Mattachine Society of Washington (Feb. 25, 1966) 16

Lewis, Gregory B., Lifting the Ban on *Gays in the Civil Service: Federal Policy Toward Gay and Lesbian Employees Since the Cold War*, 57 Pub. Admin. Rev. 387 (1997) 15

Rountree, *Venomous Speech: Problems With American Political Discourse On The Right And Left* (2013) 31

Williams Institute, *The Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment* (2009) 16

Wolfson, *Civil Rights, Human Rights, Gay Rights: Minorities and the Humanity of the Different*, 14 Harv. J. L. Pub. Pol'y 21 (1991) 15

Wolfson, *Why Marriage Matters: America, Equality, and Gay People's Right to Marry* (2004) 19

BRIEF FOR FREEDOM TO MARRY AS AMICUS CURIAE SUPPORTING PETITIONERS

This brief is submitted on behalf of Freedom to Marry as amicus curiae.[1]

INTEREST OF THE AMICUS CURIAE

Freedom to Marry is the campaign to win marriage nationwide. Founded in 2003, Freedom to Marry has spearheaded a movement and partnered with individuals and organizations across the country to assure that same-sex couples can share in the freedom to marry and attain full legal respect for their lawful marriages, with all the protections, responsibilities, and commitment that marriage brings. Freedom to Marry thus has a uniquely strong interest in the resolution of the question presented in these cases, i.e., whether the Constitution guarantees to *all* Americans the fundamental freedom to marry. For the reasons offered by the petitioners, and for the reasons further elaborated below, the answer to that question is yes.

SUMMARY OF THE ARGUMENT

When this Court has in the past been confronted with suspect governmental classifications, it has often subjected such measures to explicit heightened constitutional scrutiny under the Equal Protection

---

[1] No counsel for any party has authored this brief in whole or in part, and no person other than amicus or its counsel has made any monetary contribution intended to fund the preparation or submission of this brief. Petitioners' letter consenting to the filing of this brief is submitted concurrently herewith. Respondents' letters consenting to the filing of amicus curiae briefs generally have been filed with the Clerk's office.

Clause, *see, e.g.*, *Adarand Constr. Inc. v. Peña*, 515 U.S. 200 (1995), and petitioners are correct that the Court should explicitly apply heightened scrutiny here. But even if the Court does not apply classic heightened scrutiny—or if it declines to decide the question whether explicit heightened scrutiny applies—the discriminatory marriage bans at issue here fail under the meaningful review that this Court has applied to classifications based on sexual orientation. Indeed, because they serve no valid purpose whatsoever, the bans cannot withstand even conventional rational basis review.

This Court's application of "rational basis" review, no less than the application of heightened scrutiny, "gives substance to" the core guarantee of the Equal Protection Clause, *Romer v. Evans*, 517 U.S. 620, 632 (1996)—*viz.*, that "all persons similarly circumstanced shall be treated alike." *Johnson v. Robison*, 415 U.S. 361, 374-75 (1970) (quoting *Reed v. Reed*, 404 U.S. 71, 75-76 (1970)). By requiring that a legislative "classification bear a rational relationship to an independent and legitimate legislative end," the test "ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633.

Consistent with the test's purpose of guarding against arbitrary, discriminatory treatment, this Court's applications of rational basis review have varied with context. "When social or economic legislation is at issue, the Equal Protection Clause allows the [government] wide latitude," *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1984), on the understanding that "absent some reason to infer antipathy," the "Constitution presumes that ... even improvident decisions will eventually be recti-

fied by the democratic processes." *Vance v. Bradley*, 440 U.S. 93, 97 (1979). But when confronted with measures that give special cause for constitutional concern, this Court has engaged in "a more searching form of rational basis review." *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in the judgment). In such cases, this Court has not accepted the government's proffered justification for a classification at face value. Instead, the Court has conducted a clear-eyed analysis to test the legitimacy of the classification and confirm the classification rationally furthers legitimate governmental objectives, rather than bare prejudice or animus. Through such meaningful review, the Court has assured "all persons similarly circumstanced shall be treated alike." *Johnson*, 415 U.S. at 374-75.

Specifically, even rational basis review takes account of red flags that point to a likely constitutional violation, including whether a measure: (i) disadvantages a disfavored minority, or (ii) burdens important personal interests, such as liberty or dignity. Because respondents' denial of the freedom to marry and withholding of respect for lawful marriages implicate both of these factors, they quintessentially warrant no less than a meaningful review of their rational connection to a legitimate purpose.

Accordingly, if this Court does not subject the laws to classic heightened scrutiny, it should at the least examine them carefully under rational basis review. *See, e.g.*, *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.) (Posner, J.), *cert. denied*, 135 S. Ct. 316 (2014).

The restrictions on the freedom to marry challenged here cannot survive meaningful scrutiny. Respondents' asserted interest in "responsible pro-

creation" is not in any way furthered by denying gay people the freedom to marry—there is no reason to think that respecting the marriages and rights of same-sex couples will inhibit different-sex couples from marrying and raising their children in stable families. And even if such a reason existed, the challenged marriage bans would be a fatally underinclusive means of addressing it, because the bans deny the freedom to marry to gay people—and only gay people—while permitting heterosexuals to marry irrespective of their reproductive capacity.

Respondents' professed desire to proceed with "caution" before respecting lawful marriages of same-sex couples is no more rational, because it is hollow at its core. Caution is not an end in itself, but is at best a means of furthering otherwise valid objectives, and at worst, an excuse for denial and delay. Here, respondents' withholding of the freedom to marry and equal respect for lawful marriages, even when garbed as "caution," does not serve to advance any identified legitimate interest of the states, but only perpetuates long-standing and profoundly injurious discrimination against gay people.

Under this Court's precedents, the lack of a valid justification for the challenged marriage bans gives rise to the inference that they rest on animosity toward gay people. *Romer*, 517 U.S. at 634. In these cases, the long history of discrimination against gay people, together with the prevalence of anti-gay attitudes and rhetoric at the time the bans were enacted, render that inference conclusive.

For these purposes, there is no ground to draw a distinction between state bans on marriage and state refusals to respect out-of-state marriages. Both

types of restrictions rest on the same unpersuasive state interests, both types of regulations burden the marriage rights of gay people, and both types of regulations relegate same-sex couples to a subordinate and stigmatizing status incompatible with equal protection of the laws.

ARGUMENT

I. IF FORMAL HEIGHTENED SCRUTINY DOES NOT APPLY, RESPONDENTS' MARRIAGE BANS SHOULD BE SUBJECT TO A SEARCHING RATIONAL BASIS REVIEW

Petitioners persuasively argue that restrictions on the freedom to marry based on sex and sexual orientation should be subject to classic heightened equal protection scrutiny, and amicus Freedom to Marry fully adopts and incorporates their position here. But if the Court concludes that explicit heightened scrutiny is inappropriate (or if the Court chooses not to decide that question), it should nevertheless subject the challenged restrictions on the freedom to marry to a meaningful rationality review. Sexual orientation discrimination, such as permeates respondent states' denial of the freedom to marry and withholding of respect for lawful marriages, raises red flags and warrants a presumption of unconstitutionality.

A. The Rational Basis Test Requires Careful Scrutiny Of Laws That Deprive Disfavored Social Groups Of Dignity And Liberty

In its common application, rational basis review is distinguished by its permissiveness. Under that test, a law is typically presumed to be constitutional,

and will therefore be upheld "if any state of facts reasonably can be conceived that would sustain it." *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528 (1959). Such a state of facts "may be based on rational speculation unsupported by evidence or empirical data," and it is "entirely irrelevant ... whether the conceived reason for the challenged distinction actually motivated the legislature." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). That deferential framework, this Court has explained, rests on the premise that qualms with the incidental burdens of ordinary social and economic legislation "are properly addressed to the legislature, not to us." *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963).

In certain circumstances, however, this Court has undertaken a more careful and less deferential rationality review—one meant to confirm that a law advances a legitimate purpose as a matter of fact, rather than by judicial hypothesis. The presumption changes.

Two such circumstances are relevant to the challenged marriage bans. *First*, where a classification imposes burdens on an unpopular or disadvantaged group, even where this Court has not applied express heightened scrutiny it has still undertaken a considered inquiry to confirm that the classification genuinely serves a valid, non-discriminatory purpose. *Second*, where a classification implicates fundamental personal liberties or threatens individual dignity, this Court has responded to the elevated constitutional stakes with a probing rational basis review.

This meaningful review is compelled by the fundamental purpose of the Equal Protection Clause:

assuring that "all persons similarly circumstanced shall be treated alike." *Johnson*, 415 U.S. at 374-75. In the case of ordinary economic legislation, there is no basis to presume that a legislative classification illicitly treats similarly situated persons differently; rather, the operative presumption is that the legislature has permissively determined that the persons affected by the classification are not similarly situated in the first place. But when a legislative classification disadvantages a historically disfavored group or implicates fundamental liberties or individual dignity, there is ample reason for courts to delve deeper into the basic classification, to assure that "all persons subjected to [the challenged] legislation [are] treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." *Hayes v. Missouri*, 120 U.S. 68, 71-72 (1887).

1. *The Court Carefully Reviews The Legitimacy And Rationality Of Measures That Target Disfavored Minority Groups*

This Court's precedents frequently apply explicit heightened scrutiny to measures that discriminate against disadvantaged or vulnerable minorities. The Court has identified multiple factors that determine whether measures targeting a given group merit such heightened scrutiny, including: (1) whether the targeted group has historically been discriminated against, *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); (2) whether the characteristics that define the group "frequently bear[] no relation to ability to perform or to contribute to society," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion); (3) whether the group in question is defined by deep-rooted or immutable characteristics, *Gilliard*, 483

U.S. at 602; and (4) whether the group is "a minority or politically powerless," *id.* (citation omitted). The relation of those factors to the core concerns of the Equal Protection Clause is readily apparent: Laws that discriminate against disadvantaged groups on the basis of traits that have no bearing on the groups' abilities or contributions "suggest[] the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish." *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982).

But even in the absence of formal heightened scrutiny, such considerations remain salient in determining whether a classification comports with the Equal Protection Clause. Laws targeting disadvantaged or unpopular minorities naturally raise a concern that a classification is motivated by invidious discrimination, rather than a valid governmental end. Accordingly, such measures, even if they do not trigger formal heightened scrutiny, are subject to meaningful rationality review.

Three of this Court's cases illustrate this principle. In *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), a group of food stamp recipients challenged a federal statute that denied food stamps to "households" in which unrelated individuals resided. *Id.* at 529. Recognizing that the statute's legislative history expressed a motivation to exclude "hippies" and "hippie communes" from participation in the food stamp program, this Court cautioned that "a bare ... desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Id.* at 534. It then proceeded to carefully scrutinize the assertion that the exclusion served a legitimate fraud-prevention purpose. *Id.* at 535-38. The Court concluded that the classification drawn

was both under-inclusive and over-inclusive for combatting fraud: Those intent on fraud could easily take steps to form legally separate "households," while the most impoverished of food-stamp recipients could not. *Id.* at 537-38. The statute was thus "without any rational basis." *Id.*

This Court applied a similar analysis in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). There, a city relied on a local zoning ordinance to deny a special use permit to a group home for the intellectually disabled. *Id.* at 435. This Court repeated *Moreno*'s admonition that "a bare ... desire to harm a politically unpopular group" is not a legitimate state interest. *Id.* at 446-47 (alteration in original) (quoting *Moreno*, 413 U.S. at 534). This Court then conducted a searching review of each of the city's justifications for the ordinance. The Court rejected the city's purported interests in flood safety, overcrowding, and population density, noting that each of those concerns would apply equally to other uses, such as nursing homes, that the zoning ordinance permitted. *Id.* at 449-50. The Court noted that the record in the case did not indicate "how ... the characteristics of the intended occupants of the [group] home rationally justify denying those occupants what would be permitted to groups occupying the same site for different purposes." *Id.* at 450. It therefore concluded that the ordinance "appears to rest on an irrational prejudice against the mentally retarded" in violation of the Equal Protection Clause. *Id.*

And in *Romer v. Evans*, 517 U.S. 620 (1996), this Court invalidated a Colorado constitutional amendment prohibiting local legal protections for gays and lesbians. This Court once again affirmed that the

"desire to harm a politically unpopular" group does not constitute a legitimate state interest. *Id.* at 634 (quoting *Moreno*, 413 U.S. at 534). It then concluded that the Colorado amendment was "at once too narrow and too broad," 517 U.S. at 633, in relation to the state's proffered interests in freedom of association and resource conservation, *id.* at 635. The amendment, this Court stated, was "divorced from any factual context from which we could discern a relationship to legitimate state interests." *Id.* The Court therefore accepted "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 634.

Romer, *Cleburne*, and *Moreno* all feature a similar analysis. In each case, this Court considered challenges to governmental classifications disadvantaging minority groups that were widely maligned or misunderstood: gay people in *Romer*; the intellectually disabled in *Cleburne*; and unrelated cohabitants in *Moreno*. And in each case, this Court frankly recognized the prospect that the relevant classification was motivated by "negative attitudes," "fear," or "irrational prejudice." *Cleburne*, 473 U.S. at 448, 450; *see Romer*, 517 U.S. at 632; *Moreno*, 413 U.S. at 534. That recognition prompted the Court to carefully examine the purported justifications for each classification.

In doing so, this Court undertook at least three inquiries that ordinary rational basis review foregoes:

- *First*, the Court carefully examined the breadth of the classifications to confirm that they constituted a reasonable "fit" for the purposes adduced by the government. *Compare*

Romer, 517 U.S. at 633 ("Amendment 2 ... is at once too narrow and too broad.") *with Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955) ("The legislature may select one phase of one field and apply a remedy there, neglecting the others."); *see also Cleburne*, 473 U.S. at 449-50; *Moreno*, 413 U.S. at 538.

- *Second*, the Court treated the empirical soundness of the government's asserted justifications as a valid consideration in assessing the classification's rationality. *Compare Cleburne*, 473 U.S. at 448 ("[T]he record does not reveal any rational basis for believing that the [group] home would pose any special threat to the city's legitimate interests.") *with Beach Commc'ns*, 508 U.S. at 315 ("[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."); *see also Romer*, 517 U.S. at 635; *Moreno*, 413 U.S. at 536-38.

- *Third*, the Court demanded that the purported justifications for a classification have meaningful persuasive force. *Compare Cleburne*, 473 U.S. at 449 ("[I]t is difficult to believe that ... mentally retarded individuals ... would present any different or special hazard.") *with New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) ("[T]he judiciary may not sit as a superlegislature to judge the wisdom ... of legislative policy determinations."); *see also Romer*, 517 U.S. at 635.

It is not difficult to see why the Court, faced with statutes that bore indicia of a "bare ... desire to

harm a politically unpopular group," *Moreno*, 413 U.S. at 534, engaged in less deferential, meaningful rationality review. Unlike routine economic legislation, classifications that burden marginalized minorities raise ineluctable concerns about the possibility of invidious discrimination. They therefore require searching review to confirm that the justifications offered by the state for the differential treatment are truly based in reason, and not mere pretexts for unconstitutional animus. *See Romer*, 517 U.S. at 633.

Otherwise said, where there is reason to suspect that the state is treating similarly situated persons differently for no good reason, this Court has eschewed ordinary deference and required the state to provide a real and persuasive reason for the differential treatment. Under this Court's precedents, sexual orientation discrimination such as that challenged here raises red flags, is presumptively unconstitutional, and should be subjected to meaningful review. *See, e.g.*, *Romer*, 517 U.S. at 634-35.

2. *Rational Basis Review Extends Less Deference To Measures That Infringe Important Individual Interests*

The rational basis test also takes account of the personal interests that a governmental classification may burden. Under this Court's precedents, rational basis review requires more thorough and skeptical scrutiny when classifications hinder the exercise of important personal interests, such as individual liberty.

This Court has exercised particularly special caution when evaluating classifications that burden an individual's freedom to enter into and define personal or familial relationships. In *Eisenstadt v.*

Baird, 405 U.S. 438 (1972), the Court invalidated a state law that prohibited the sale of contraceptives to unmarried individuals, but not married ones. That classification, *Eisanstadt* explained, trod upon important personal liberties, including "matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453. And the plurality's rationality review was correspondingly exacting—the opinion highlighted elements of the law that were over- and under-inclusive, and, on that basis, rejected the law as irrational discrimination. *Id.* at 447-53.

The Court applied the same approach even more explicitly in *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). There, the Court reviewed a law that conditioned a parent's appeal of a termination of parental rights on her ability to pay substantial appellate court fees. *See id.* at 106-07. *M.L.B.* recognized that the law burdened "[c]hoices about marriage, family life, and the upbringing of children" that are "among associational rights ... of basic importance in our society." *Id.* at 116 (quotation omitted). The Court held that in the context of parental-rights terminations, rationality review "demands the close consideration the Court has long required when a family association so undeniably important is at stake." *Id.* at 116-17.

Romer illustrates that such meaningful review is not limited to measures burdening familial relationships—or even to measures burdening a specific exercise of liberty. The amendment in *Romer* withdrew anti-discrimination protections from gay people with respect to critical personal interests such as housing, employment, education, public accommodations, and welfare services. 517 U.S. at 623-24. The

Court thus had before it not only a measure that on its face targeted members of a disadvantaged minority, but one that affected their equal participation in "an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Id.* at 631. The Court's review was vigilant for those important interests in full participation and dignity.

B. The Challenged Marriage Bans Require Meaningful Scrutiny Even Under Rational Basis Review

Respondents' marriage bans discriminate against members of an historically disparaged minority—namely, gay people. And they deprive gay people of personal liberty and dignity. They present quintessential examples of measures that must be presumed unconstitutional and subjected to meaningful rationality review.

1. *The Challenged Bans Disadvantage A Discrete And Historically Disfavored Social Minority*

There can be no serious dispute that gay people have suffered discrimination, from the first modern acknowledgments of gay identity[2] to the present day. *See Lawrence*, 539 U.S. at 571 ("[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral."). That history, detailed in petitioners' merits briefs,[3] includes public and private

---

[2] *See Lawrence*, 539 U.S. at 568 ("[T]he concept of the homosexual as a distinct category of person did not emerge until the late 19th century.").

[3] *See* Br. for Pet. Obergefell 42-44; Br. for Pet. Deboer 51; Brief for Pet. Bourke 33-34.

humiliations, assaults, and deprivations ranging from police raids on gay establishments,[4] to a decades-long exclusion from the federal civil service,[5] to gay people's loss of jobs, housing, and custody of their children based solely on their sexual orientation.[6] Although that noxious history supports heightened scrutiny under this Court's equal protection jurisprudence, it at a minimum requires that laws discriminating on the basis of sexual orientation should enjoy no presumption of constitutionality and receive careful review. *See supra* Part I.A.1.

That long and painful history of discrimination against gay people has been based on perceived distinctions that "bear no relation to ability to perform or contribute to society." *Frontiero*, 411 U.S. at 686. Rather, it has been based on stereotypes that have no legitimate basis in fact. A 1966 letter from Civil Service Commission Chairman John W. Macy to an early gay rights organization defended the exclusion of gay people from government service by reference to "the apprehension caused other employees of homosexual advances, solicitations, or assaults, the unavoidable subjection of the sexual deviate to erotic stimulation through on-the-job use of the common toilet, shower and living facilities," and "the hazard that the prestige and authority of a Government position will be used to foster homosexual activity, par-

---

[4] *See* Chauncey, *Gay New York* 138-39 (1994).

[5] *See* Lewis, *Lifting the Ban on Gays in the Civil Service: Federal Policy Toward Gay and Lesbian Employees Since the Cold War*, 57 Pub. Admin. Rev. 387, 387 (1997).

[6] Wolfson, *Civil Rights, Human Rights, Gay Rights: Minorities and the Humanity of the Different*, 14 Harv. J. L. Pub. Pol'y 21, 30-33 (1991) (collecting examples).

ticularly among the youth." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 981 (2010) (quoting Letter from John W. Macy to Mattachine Society of Washington 2-4 (Feb. 25, 1966)). Similar views have persisted in more recent times, even among government officials. *See* The Williams Institute, *Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment* ch. 14 (2009).

Even if this history of discrimination against gay people were not premised largely on the types of malicious stereotypes described above, but instead rested on adherence to tradition or disapproval rooted in religious conviction, it would nevertheless require a demanding rationality inquiry. Invidious discrimination can arise not only from outright hostility, but also from "insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respect from ourselves." *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). Laws that serve no purpose but to disadvantage gay people necessarily rest on such unexamined stereotypical thinking, as this Court has recognized by thrice ruling that simple disapproval of homosexuality does not provide a constitutionally valid justification for classifications based on sexual orientation. *See United States v. Windsor*, 133 S. Ct. 2675, 2693-94 (2013); *Lawrence*, 539 U.S. at 577-78; *Romer*, 517 U.S. at 634-35.

Those rulings confirm not only that, as a general rule, sexual orientation "bears no relation to ability to perform or contribute to society," *Cleburne*, 473 U.S. at 441 (quotation omitted), but also that it is

specifically irrelevant to the ability to participate fully in the institution of marriage, *Windsor*, 133 S. Ct. at 2694 (affirming that same-sex couples are equally worthy of the federal benefits and burdens of marriage). At the very least, the lack of a nexus between sexual orientation and social participation and contributions—including the fulfillment of the responsibilities of marriage—means that respondents' marriage bans cannot be accorded the same presumption of constitutional validity that attaches to more ordinary legislative enactments.

2. *The Denial Of The Freedom To Marry And Withholding Of Respect For Lawful Marriages Burden Individual Liberty And Dignitary Interests*

This Court's precedents have long recognized "[t]he freedom to marry ... as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *see Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) ("[T]he right to marry is of fundamental importance for all individuals."); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (citing right "to marry, establish a home and bring up children" as a central protection of Due Process Clause). But even without the strict scrutiny triggered by the denial of such a fundamental right, the substantial burdens that the challenged marriage bans impose on the liberty and dignity of countless gay people at the very least require searching rational basis review.

On their face, the marriage bans restrict the liberty of gay people to make basic "[c]hoices about marriage, family life, and the upbringing of children." *M.L.B.*, 519 U.S. at 116. As *M.L.B.* and *Ei-*

senstadt each recognized, such encumbrances on individuals' liberty to define and control their intimate and familial relationships merit meaningful judicial review. *Id.* at 116-17; *see Eisenstadt*, 405 U.S. at 453.

The bans not only infringe individual liberties in family life, but also the equal dignity of gay people in community and political life. Because marriage represents a state's declaration that an intimate relationship is "worthy of dignity in the community," *Windsor*, 133 S. Ct. at 2692, respondents' bans operate to withhold "a dignity and status of immense import" from gay people, *id.* at 2681. That "interference with the equal dignity of same-sex" relationships, *id.* at 2693, imposes profound symbolic as well as tangible harms that compromise the ability of gay people to fully participate in American civic life. As this Court has recognized, codified discrimination against same-sex intimate relationships "demeans the lives of homosexual persons" and amounts to "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Lawrence*, 539 U.S. at 575. Restrictions on the freedom to marry likewise undermine the self-worth and personal development of the children of same-sex couples, who are left to question the "integrity and closeness of their own family" in the face of inferior legal status and treatment. *Windsor*, 133 S. Ct. at 2694.

Respondents' marriage bans impose more concrete public harms as well. The bans deprive same-sex couples of the myriad economic and legal protections and responsibilities that marriage entails, including access to health insurance, tax advantages, and public welfare benefits. *See id.* at 2695. In this

manner, the marriage bans at issue here deprive gay people of the seemingly mundane legal protections that "constitute ordinary civic life in a free society" for those lucky enough to enjoy them. *Romer*, 517 U.S. at 631.

This Court's precedents recognize that such a far-reaching classification calls for meaningful scrutiny even under rational basis review—scrutiny commensurate to the burdens the classification imposes on public and private individual interests. *See Romer*, 517 U.S. at 627, 632-35 (giving "careful consideration," *id.* at 633, to classification imposing burdens "with respect to transactions and relations in both the private and governmental spheres," *id.* at 627).

II. RESTRICTIONS ON THE FREEDOM TO MARRY BASED ON SEX AND SEXUAL ORIENTATION CANNOT SURVIVE MEANINGFUL REVIEW

Gay people share the same mix of reasons for wanting and needing the freedom to marry and respect for their lawful marriages as non-gay people.[7] Restrictions on the freedom to marry based on sex and sexual orientation—such as the marriage bans challenged here—cannot survive even rationality review of the sort described above.

---

[7] *See* Wolfson, *Why Marriage Matters: America, Equality, and Gay People's Right to Marry* 8-24 (2004).

A. The Rationales For Marriage Bans Based On Sex And Sexual Orientation Proffered By The Sixth Circuit Do Not Withstand Searching Rational Basis Review

As described, when a classification shows indicia of invidiousness or burdens important personal interests, even rationality review requires that the government's asserted justifications not be accepted at face value. Instead, the Court assesses the legitimacy of the governmental purpose, the fit of the classification to the interest it ostensibly serves, as well as whether there exists a credible, non-pretextual empirical basis for the government's proffered justification. *See supra* at I.A; *Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring) ("[A] court applying rational basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications." (citing *Cleburne*, 473 U.S. at 446-47, 450, and *Moreno*, 413 U.S. at 533-36).

Insisting on an actual rational relationship between a classification and a legitimate governmental purpose "ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633. Classifications that are lacking in factual support or ill-suited to advance the government's stated purposes "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 634.

Respondents' bans cannot survive such a searching rationality review. The professed concerns that the Sixth Circuit invoked to justify the bans lack any factual basis whatsoever, and the bans' scope and effect in any event bear little, if any, relation to those concerns. Even under rationality review, the justifications cited by the Sixth Circuit provide no basis for sustaining laws that deprive gay people of the freedom to marry.

1. *The "Unintended Child" Rationale Cannot Survive Scrutiny And Fails On Its Own Terms*

a. The Sixth Circuit posited that respondents' denial of same-sex couples' freedom to marry was rationally related to a state interest in channeling heterosexual sex into committed relationships that mitigate the consequences of "unintended offspring." *DeBoer v. Snyder*, 772 F.3d 388, 405 (6th Cir. 2014). The institution of marriage, the court of appeals asserted, "create[s] an incentive for two people who procreate together to stay together for purposes of rearing offspring." *Id.* Respondents' marriage bans, it continued, simply reflected "the biological reality that couples of the same sex ... do not run the risk of unintended offspring." *Id.*

That rationale suffers from a flaw that is fatal under meaningful review: While respondents' alleged interest in "responsible procreation" does not compel that gay people be *included* in the institution of marriage, it provides no logical basis for their *exclusion* from the personal, economic, and dignitary benefits that legal marriage provides. Marriage is not a scarce resource the benefits of which must be rationed: A same-sex couple's marriage, or freedom

to marry, does not deprive different-sex couples of their freedom to marry and responsibly raise their offspring.[8]

The Sixth Circuit made no effort to explain how the denial of the freedom to marry to gay people furthers respondents' interest in promoting "responsible procreation." It did not point to any record evidence or other factual basis suggesting a rational relationship between respondents' marriage bans and the welfare of unintended children.[9] Nor did the court attempt to identify such a relationship through "rational speculation." *Id.* (quotation omitted). Instead, the court found it unnecessary to verify that the marriage bans in fact promoted responsible procreation, on the belief that rational basis review does not hold governments to account "for doing too much or too little in addressing a policy question." *Id.*

But as shown in Part I above, even under rational basis, such extreme deference is inappropriate for measures (such as the challenged marriage bans) that target disfavored minorities and deprive them of important personal interests. Because such measures provide cause for concern about the pres-

---

[8] *Cf. Romer*, 517 U.S. at 635 (rejecting argument that state "interest in conserving resources to fight discrimination against other groups" justified denial of anti-discrimination protections to gay people).

[9] On the contrary, the court appeared to acknowledge that the "evidence ... and judicial factfinding" in these cases refuted such a relationship. *DeBoer*, 775 F.3d at 405. Indeed, as Judge Posner recognized, by denying the benefits of marriage to same-sex couples who are or wish to become adoptive parents, such bans serve only to *undermine* the government's interest in managing the consequences of unintended offspring. *See Baskin*, 766 F.3d at 672.

ence of invidious discrimination, courts must carefully examine the government's decision to "do[] ... too little" in order to ensure that the exclusion of minorities from benefits extended to others has factual and logical justification and is not motivated by irrational prejudice. *See, e.g.*, *Romer*, 517 U.S. at 630-31. In *Moreno*, for example, this Court did not uncritically accept the exclusion of non-traditional households from the food stamp program as if it arose from an ordinary governmental line-drawing exercise; rather, it inquired whether that exclusion *in fact* furthered the government's professed objectives—and held that it did not. *Moreno*, 413 U.S. at 536-38; *see Heller v. Doe*, 509 U.S. 312, 321 (1993) ("[T]he standard of rationality ... must find some footing in the realities of the subject addressed by the legislation.").

Here, the "record does not reveal any rational basis for believing" that respecting gay people's freedom to marry "would pose any special threat to [respondents'] legitimate interests," *Cleburne*, 473 U.S. at 448, in "responsible procreation." Under a meaningful rationality review, that deficiency alone provides a sufficient basis to reject the "unintended offspring" rationale as insufficient, if not indeed pretextual. *Id.* at 449-50.

b. But even assuming that respondents' marriage bans helped advance respondents' interest in so-called "responsible procreation," they would still fail a meaningful review because they are "at once too narrow and too broad" with respect to that goal. *Romer*, 517 U.S. at 633.

The bans are too narrow because they do not deny the freedom to marry to all couples that are incapable of reproduction, but only to gay couples. The

logic of the "unintended offspring" rationale would apply equally to different-sex couples that cannot procreate, whether due to age, physical infirmity, or incarceration. *See Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting) ("[W]hat justification could there be for denying the benefits of marriage to homosexual couples ...? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry."). Yet the challenged marriage bans do not withhold the freedom to marry from such non-gay couples, who are granted freedom to marry with no apparent resulting harm to respondents' interest in promoting responsible childrearing. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (recognizing "a constitutionally protected marital relationship in the prison context"). Even if denying the freedom to marry to couples incapable of reproducing could advance that interest, respondents' bans on same-sex couples (and only same-sex couples) marrying are "so riddled with exceptions" that promotion of responsible procreation "cannot reasonably be regarded as [their] aim." *Eisenstadt*, 405 U.S. at 449; *see Cleburne*, 473 U.S. at 449-50.

At the same time, the bans are too broad because their "sheer breadth is so discontinuous with the reasons offered for [them] that [they] seem[] inexplicable by anything but animus." *Romer*, 517 U.S. at 632. As this Court has repeatedly stated, marriage is about much more than procreation:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an asso-

> ciation for as noble a purpose as any involved in our prior decisions.

Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)). The marriage bans challenged here thus do much more than withhold incentives for "responsible procreation"; they deprive gay people of the ability to "express[] emotional support and public commitment," and to "exercise [their] religious faith" by solemnizing their relationships under the law. *Turner*, 482 U.S. at 95-96.

Gay people are parents, too, and the challenged marriage bans' overbreadth is made yet more apparent by their cruel impact on the children of same-sex couples. The bans deprive those children of "the emotional comfort that having married parents is likely to provide," *Baskin*, 766 F.3d at 663, while at the same time injuring their equal status and dignity by "telling them they don't have two parents, like other children," *id.* at 671. The bans also inflict economic harm on the children, raising their family's cost of healthcare and defeating or reducing their eligibility for important governmental benefits. *See Windsor*, 133 S. Ct. at 2695. These emotional, dignitary, and economic harms to the adopted and biological children of same-sex couples give the lie to the notion that the bans rationally relate to any state interest in child welfare.

Respondents' infliction of such "immediate, continuing, and real injuries" on gay people and their children—injuries that are untethered from and often inimical to any genuine state interest in child raising—"outrun and belie any legitimate justifica-

tions that may be claimed" based on such interests. *Romer*, 517 U.S. at 635.

2. *The "Wait and See" Rationale Fails Rational Basis Review*

The Sixth Circuit separately held that "a State might wish to wait and see before changing a norm that our society ... has accepted for centuries." *DeBoer*, 772 F.3d at 406. Although the court insisted that this justification was not a matter of "preserving tradition for its own sake," *id.*, it did not identify a single hazard—not one—that might ensue from respecting the freedom to marry to couples of the same sex.

Even under rational basis review, a classification cannot be sustained based on inchoate fears about unspecified dangers. Because the government can always suggest proceeding with "caution," the Sixth Circuit's "wait and see" rationale "would turn the rational basis analysis into a toothless and perfunctory review." *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1213 (D. Utah 2013), *aff'd*, 755 F.3d 1193 (10th Cir. 2014).[10]

This Court's cases confirm that caution is not a legitimate end in itself, but only a means of advancing otherwise legitimate government interests. In *Cleburne*, for example, the City of Cleburne argued

---

[10] Both *Romer* and *Eisenstadt* prove this proposition. In each case, the government easily could have invoked an interest in proceeding with caution—caution about the sale of contraceptives to unmarried people in *Eisenstadt*, and about the recognition of new anti-discrimination rights in *Romer*. But that argument would have made little difference to this Court's conclusion that the classifications in those cases violated equal protection.

that its zoning-permit denial was justified by concerns that residents at a group home for the intellectually disabled might come into conflict with neighbors and children at a nearby school. 473 U.S. at 448-49. This Court did not reflexively validate the city's worries about unrealized future events, but instead subjected them to careful review to determine whether they embodied legitimate governmental interests. *Id.* It concluded that they did not: the potential reactions of the community could arise only from "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding." *Id.* at 448; *see id.* at 449.

That holding makes clear that caution itself must be grounded in something real and concrete, and not predicated on—or a proxy for—the legislature's or community's dislike for the minority group affected by a classification. *Cf., e.g., Palmore v. Sidoti*, 466 U.S. 429, 433–34 (1984) (rejecting cases justifying housing segregation based on concerns about public disquietude); *United States v. Virginia*, 518 U.S. 515, 543–45 (1996) (reviewing historical concerns that institutions would be degraded by admission of females). The Sixth Circuit did not identify any specific concern warranting a "wait and see" approach, much less one based on a valid governmental interest unrelated to "mere negative attitudes" against gay, lesbian, and bisexual people. *Cleburne*, 473 U.S. at 448.

Although a concrete need for and the benefits of "caution" were not substantiated by the Sixth Circuit, the costs of the discriminating states' "caution" here are clear. Every day in which respondents withhold respect for gay people's freedom to marry is a day of real injury, indignity, and injustice for

same-sex couples and their children; injuries and indignities such as those inflicted on petitioner James Obergefell, who was forced to go to the expense and difficulty of marrying his terminally ill, immobile partner on a Maryland airport runway because their home state of Ohio refused this loving and committed couple the freedom to marry. *See* Br. for Pet. Obergefell 6-7. Measures that inflict such intense and far-reaching harms on so many cannot be made constitutionally whole by an amorphous state invocation of "caution."

B. The Absence Of A Valid Rationale For The Marriage Bans Establishes That The Withholding Of The Freedom To Marry And Respect For Marriages Are Motivated By Impermissible Animus

A central premise of this Court's cases applying meaningful rationality review is that a when legislative classification targets a social minority and lacks any apparent legitimate goal, there arises "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer*, 517 U.S. at 634. Put another way, when legitimate explanations for a law targeting a disliked minority fail, red flags go up and a reasonable conclusion is that the minority was targeted simply *because* it is disliked. *See Cleburne*, 473 U.S. at 450; *Moreno*, 413 U.S. at 540. That is precisely the "kind of 'class or caste' treatment" that the Equal Protection Clause was "designed to abolish." *Plyler*, 457 U.S. at 216 n.14; *see also Romer*, 517 U.S. at 635 ("Class legislation is obnoxious to the prohibitions of the Fourteenth Amendment." (alterations and quotation omitted)).

Such animus need not necessarily reflect flagrant bigotry or malice in order to render a classification unconstitutional; it can arise from "insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring). But in all events, a state violates the equal protection guarantee when it legislates on the basis of "irrational prejudice," *Cleburne*, 473 U.S. at 449-50, or "select[s] or reaffirm[s] a particular course of action" because of its negative effects on specific group. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

As shown, the non-invidious explanations that respondents have put forward for their marriage discrimination do not withstand serious inquiry. *See supra* Part II.A. The absence of legitimate rational basis for the bans leads to the conclusion that they reflect "a bare ... desire to harm" gay people. *Romer*, 513 U.S. at 634 (quotation omitted).

That inference finds support in the historical and political context in which the challenged bans (and numerous similar measures) arose. In the mid-1990s, in response to the Hawaii Supreme Court's historic decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), states across the country began imposing formal legal restrictions on the freedom to marry. At that time, the deep-seated anti-gay attitudes described in Part I.B.1, *supra*, still persisted and were exploited for political purposes. In 1994 opinion polls, a majority of respondents stated that they would not see a gay doctor or permit their children to

play in the home of a friend with a gay parent.[11] Because of similar attitudes, it was not uncommon in that period for gay or lesbian parents to lose custody of their own children on the basis of judicial finding that it was "not in the child's best interest" to be raised by a gay person. *See* Chauncey, *Why Marriage?* 107 (2004). The statutory marriage bans here at issue were enacted in the same setting, *see* Mich. Comp. Laws § 551.1 (1996); Ky. Rev. Stat. § 402.005 (1998); Tenn. Code Ann. § 36-3-113(a) (1996), and the widespread national support that such laws received reflected the negative attitudes and prejudices toward gay people at that time.

The challenged state constitutional amendments were passed just a few years later, in the mid-2000s, ostensibly in response to the Massachusetts Supreme Court's decision in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003). *See* Tenn. Const. art. XI, § 18 (2006); Mich. Const. art. I, § 25 (2004); Ohio Const. art. XV, § 11 (2004); Ky. Const. § 233A (2004). The sponsor of Ohio's constitutional marriage ban openly relied on vicious anti-gay slurs, distributing literature stating that "[s]exual relationships between members of the same sex expose gays, lesbians and bisexuals to extreme risks of sexually transmitted diseases, physical injuries, mental disorders and even a shortened lifespan." *Obergefell v. Wymsylo*, 962 F. Supp. 2d 968, 975 (S.D. Ohio 2013). The same organization accused advocates of the freedom to marry of seeking to eliminate restrictions on underage, incestuous,

---

[11] *See* American Enterprise Institute, Attitudes About Homosexuality & Gay Marriage 9 (2008), *available at* http://www.aei.org/wp-content/uploads/2011/10/20080603-Homosexuality.pdf.

and polygamous marriage. *Id.* At a 2006 rally in support of Tennessee's constitutional marriage ban, a speaker described the ban as part of a "war against homosexual militants" and against "debauchery"[12]; in the same election, an organization that advocated for the ban also bought advertisements denouncing a senate candidate in that state as a backer of "the radical homosexual agenda."[13] And in the run-up to the election in which Kentucky's marriage ban was enacted, one candidate in the state's senate election attacked the other as "limp-wristed" and "a switch hitter"—overtly anti-gay attacks that ultimately resulted in electoral victory.[14] Because of the disfavored position of gay people and the "gay exception" in much of the law of the time, the launching of an unprecedented wave of state constitutional amendments targeting one group of people and denying them a fundamental liberty interest was treated by much of the media and political class not as radical or shocking, but as mere politics that were, at worst, tolerable.

In short, respondents' marriage bans have their roots in a period of rampant, unreflective, and often malicious stereotyping of gay people—a "dislike and disapproval against homosexuals." *Lawrence*, 539

---

[12] Kelley, *A Marriage of Politics and Religion*, The Nashville Scene, Oct. 19, 2006, at 11, *available at* http://www.nashvillescene.com/nashville/a-marriage-of-politics-and-religion/Content?oid=1193824.

[13] Leibovich, *From Star Power to Blood Sport, Tennessee Senate Race Has It*, N.Y. Times (Nov. 5, 2006), *available at* http://www.nytimes.com/2006/11/05/us/politics/05diary.html?pagewanted=all&_r=0.

[14] *See* Rountree, *Venomous Speech: Problems With American Political Discourse On The Right And Left* 240 (2013).

U.S. at 583. This background of actively hostile attitudes toward gay people only confirms what the states' inability to set forth any valid explanation for the challenged marriage bans already makes clear—the bans advanced then-prevalent social attitudes about gay people, rather than any legitimate governmental purpose. *See Cleburne*, 473 U.S. at 450.

C. There Is No Ground for Distinction Between Respondents' Refusal To Respect Out-Of-State Marriages And Withholding The Freedom To Marry Itself

Neither respondents nor the Sixth Circuit—nor, to our knowledge, any other court—has even hinted at a rationale that would justify upholding respondents' outright denial of the freedom to marry, but not their refusal to respect out-of-state marriages.

It nevertheless bears emphasis that no such rationale exists. Neither respondents' professed interest in "responsible procreation" nor their interest in "Burkean caution," *see DeBoer*, 772 F.3d at 405-06, turns in any way on the physical location in which a marriage license is issued. Whether a state affords the freedom to marry or merely respects the out-of-state marriages of same-sex couples, the hypothesized injury to the state's asserted interests would be the same: significant numbers of same-sex couples will enjoy legal recognition of their marital relationship. To be sure, states enjoy a unique sovereign interest over questions of domestic relations, including the regulation of civil marriages. *See Windsor*, 133 S. Ct. at 2691. But that authority is circumscribed by the Fourteenth Amendment's requirements of equal protection and due process. *See Loving*, 388 U.S. 1; *Meyer*, 262 U.S. 390. The constitutional prin-

ciples of equality and liberty that prohibit states from denigrating the marriages of same-sex couples wed in other states constrain the state's discriminatory denial of the freedom to marry within its borders.

This Court's affirming only the limited right to marriage recognition would but prolong the struggle and perpetuate the injuries and indignity that the challenged marriage bans inflict. While many can travel to another state to marry, others lack the good health or financial means to do so. For such couples, denying a license in the state in which they reside amounts to an outright denial of the freedom to marry. This Court has held that financial burdens on marriage rights violate the right to due process. *See Boddie v. Connecticut*, 401 U.S. 371, 380–81 (1981) (holding filing fees for divorce actions violate due process by burdening freedom of indigents to remarry); *Zablocki*, 434 U.S. at 375–77 (holding that law conditioning right to marriage on satisfaction of child support obligations violates due process). Where, as here, financial obligations would be imposed in order for same-sex couples to marry, but not for different-sex couples, that requirement would also violate the Equal Protection Clause.

Even for couples who could afford travel to a freedom-to-marry state, the withholding of the freedom to marry within their home state would cast a badge of inferiority on their lawful marriage by "identify[ing] a subset of state-sanctioned marriages and mak[ing] them unequal." *Windsor*, 133 S. Ct. at 2694. As *Windsor* explained, "[b]y creating two contradictory marriage regimes within the same State"—one for marriages celebrated within the state's borders and one for marriages celebrated out-

side its borders—the state would "undermine[] both the public and private significance of ... same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy" of celebration within the state. *Id.* In effect, the state's withholding the freedom to marry perpetuates stigma and consigns same-sex couples forced to marry in other states to "a second tier marriage." *Id.*

Such an abridgment of the freedom to marry undermines the security and clarity that marriage is intended to bring; no less than any other codified form of discrimination against gay people, it is an open "invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Lawrence*, 539 U.S. at 575. The perpetuation of such "class or caste" legislation violates the core guarantees of the Equal Protection Clause. *Plyler*, 457 U.S. at 216 n.14. We are one country, with one Constitution – and the dignity, security, and meaning that the freedom to marry and respect for marriages entail belong to all Americans, gay and non-gay alike.

CONCLUSION

"It is not the Constitution that has changed, but the knowledge of what it means to be gay or lesbian." *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1203 (D. Utah 2013). As Americans have come to a better understanding of who gay people are and why marriage matters, they have come to support the freedom to marry for same-sex couples.[15] This Court

---

[15] *See* CNN, *Poll: Majority Backs Same-Sex Marriage* (June 26th, 2013), *available at* http://politicalticker.blogs.cnn.com/2013/06/26/poll-majority-backs-same-sex-marriage/.

should make clear that sexual orientation discrimination is presumptively unconstitutional and warrants meaningful scrutiny. Even under rational basis review, the withholding of the freedom to marry and full and equal respect for lawful marriages must end.

Respectfully submitted.

JONATHAN P. SCHNELLER
DIMITRI PORTNOI
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, Cal. 90071

ANTON METLITSKY
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, N.Y. 10036

WALTER DELLINGER
(*Counsel of Record*)
wdellinger@omm.com
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Amicus Curiae Freedom to Marry

March 6, 2015